A

JOHOR COASTAL DEVELOPMENT SDN BHD

v.

CONSTRAJAYA SDN BHD

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-02-2007(J)]

C

12 JUNE 2009

CONTRACT: *Sale and purchase of property - Claim for repayment of moneys paid following termination of agreement - Whether vendor could retain moneys paid as reasonable compensation - Whether s. 75 Contracts*

D *Act 1950 applicable - Whether Selva Kumar Murugiah v. Thiagarajah Retnasamy good law - Whether contracting parties could contract out of s. 75*

The appellant and the respondent entered into two identical sale

E and purchase agreements ('the SPA') whereby the respondent agreed to purchase lots 7 and 14 of the Johor Bahru Waterfront City for RM4,590,000 and RM10,830,000 respectively. The purchase price was to be paid by six instalments. The respondent made the initial payment of 12% and then made subsequent

F payments amounting to 50% of the purchase price. After that the respondent defaulted in payments. The appellant terminated the SPA and forfeited all moneys paid as per the terms of the SPA. The respondent commenced an action against the appellant to recover the moneys paid. The High Court ordered the appellant

G to refund all the moneys as actual damage was not proved and so it could not be determined whether the moneys paid was a reasonable compensation as envisaged by s. 75 of the Contracts Act 1950 ('CA'). On appeal the Court of Appeal allowed the appeal in part by holding that the appellant was entitled to forfeit

H 12% of the purchase price as deposit but must refund the balance as actual damage was not proved. The appellant obtained leave to appeal to this court on questions that raised the following issues: (1) whether the forfeiture was lawful in view of s. 75 CA; (2) whether the Federal Court case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* ('*Selva Kumar*') was good law; and (3)

I whether the contracting parties could contract out of s. 75 CA.

Held (dismissing the appeal by majority)
Per Arifin Zakaria CJ (Malaya) & Alauddin Sheriff PCA concurring (majority):

(1) The appellant could not retain the moneys paid as reasonable compensation without proof of loss or damage as envisaged by s. 75 CA. In *Selva Kumar* it was held that actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v. Baxendale*. (paras 32 & 33)

(2) The Indian Supreme Court case of *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* fell into the category of cases where the loss suffered was incapable of assessment. Hence, the amount stipulated might be regarded as a genuine pre-estimate of damages and therefore recoverable. In *Selva Kumar* the court recognised that where the court found it difficult to assess damages, the stipulated sum might be recoverable. It should be noted that no where in the *Oil & Natural Gas* case did the Indian Supreme Court find that the provisions of the Indian Contracts Act could be contracted out. Therefore, *Selva Kumar* was still good law. (paras 35 & 36)

(3) There was no clear provision in the SPA that excluded the application of s. 75 CA. Therefore, the question whether the contracting parties could contract out of s. 75 CA did not arise. (paras 38 & 39)

Per Hashim Yusoff FCJ (dissenting):

(1) The gist of the cases referred by the Federal Court in *Selva Kumar* was that s. 75 CA must be given a restricted construction. A plaintiff claiming actual damages for breach of contract must still prove the actual damages or reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale*. (para 59)

(2) Clause 8.2 of the SPA clearly stated that all instalments paid by the respondent should be forfeited except where the termination occurred within four months from the date of the SPA. It was the respondent that was the defaulting party and therefore the appellant was entitled to forfeit all the moneys paid to it. (paras 62 & 62)

(3) It is trite law that it is up to a plaintiff to prove his loss. The respondent was the plaintiff in the High Court that sought to claim the moneys it paid the respondent after the latter terminated the SPA. Therefore, the burden lay on the respondent to prove its loss and not on the appellant which was the innocent party. Even if wrong the finding as to who the actual plaintiff was, *Selva Kumar* decided that where the court found it difficult to assess damages, the court ought to award substantial damages as opposed to nominal damages which were reasonable and fair according to good sense and fair play. (paras 65 & 66)

(4) The appellant could keep the first payment or 12 % of the purchase price pursuant to cl. 8.2(b) SPA. The subsequent payment of instalments up to the time of default should also be awarded to the appellant as being a reasonable amount in view of the nature of the project and its abandonment by the respondent three years after the SPA was signed. The finding was also based on illus. (f) to s. 75 CA. (paras 68 & 69)

(5) The parties specifically agreed under cl. 8.2(b) of the SPA that in the event of a breach of the SPA, all the moneys paid thereunder would be forfeited. A sum was clearly named as the amount to be paid in case of such a breach. The appellant was therefore entitled to receive from the respondent who had broken the contract a reasonable compensation not exceeding the amount so named, whether or not actual damage or loss was proved. Under cl. 16.2 of the SPA the parties agreed that the sums stipulated to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party. Any objection thereafter was waived. That stipulation was not contrary to s. 75 CA. (para 73)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan responden memasuki dua perjanjian jualbeli yang sama ('SPA') di mana responden bersetuju membeli lot 7 dan lot 14 Johor Bahru Waterfront City untuk RM4,590,000 dan RM10,830,000 masing-masing. Harga pembelian dipersetujui dibayar dalam enam ansuran. Responden membayar 12% jumlah pembayaran dahulu dan seterusnya telah membuat pembayaran sehingga 50% daripada harga pembelian. Selepas itu, responden berhenti membayar ansurannya. Perayu menamatkan SPA dan menebus semua wang yang dibayar responden ('wang tersebut')

mengikut terma-terma SPA. Responden memulakan tindakan terhadap perayu untuk mendapatkan semula wang tersebut. Mahkamah Tinggi mengarahkan perayu mengembalikan wang tersebut atas alasan ganti rugi sebenar tidak dibuktikan dan dengan itu ianya tidak boleh ditentukan sama ada wang tersebut merupakan pampasan munasabah mengikut s. 75 Akta Kontrak 1950 ('CA'). Apabila dirayui, Mahkamah Rayuan membenarkan rayuan sebahagian dengan mendapati perayu berhak menebus 12% pembayaran tersebut sebagai deposit tetapi mesti mengembalikan bakinya kerana ganti rugi sebenar tidak dibuktikan. Perayu mendapatkan kebenaran merayu kepada mahkamah ini atas persoalan-persoalan yang membangkitkan isu-isu yang berikut: (1) sama ada penebusan tersebut sah mengikut s. 75 CA; (2) sama ada kes Mahkamah Persekutuan *Selva Kumar Murugiah v Thiagarajah Retnasamy* ('*Selva Kumar*') masih merupakan undang-undang terpakai; dan (3) sama ada pihak-pihak perjanjian boleh mengecualikan s. 75 CA.

Diputuskan (menolak rayuan dengan majoriti)
Oleh Arifin Zakaria HB (Malaya) & Alauddin Sheriff PMR menyetujui (majoriti):

(1) Perayu tidak boleh menebus wang tersebut sebagai pampasan munasabah tanpa bukti kerugian atau ganti rugi mengikut s. 75 CA. Kes *Selva Kumar* memutuskan bahawa ganti rugi sebenar atau pampasan munasabah mesti dibuktikan mengikut prinsip-prinsip yang ditetapkan dalam kes *Hadley v. Baxendale.*

(2) Kes Supreme Court India *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* termasuk ke dalam kategori kes-kes di mana kerugian yang dialami tidak boleh dinilaikan. Maka, jumlah yang dianggarkan mungkin boleh dianggap sebagai pra-taksiran ganti rugi dan boleh didapatkan kembali. Dalam kes *Selva Kumar* mahkamah mengiktiraf bahawa di mana terdapat kesukaran dalam penilaian ganti rugi, anggaran yang ditentukan mungkin boleh didapatkan kembali. Ia mesti diperhatikan bahawa kes *Oil & Natural Gas* tidak memutuskan bahawa peruntukan-peruntukan Akta Kontrak India boleh dikecualikan. Maka, kes *Selva Kumar* masih merupakan undang-undang yang terpakai.

(3) Tiada peruntukan jelas SPA yang mengecualikan aplikasi s. 75 CA. Dengan itu, persoalan sama ada pihak-pihak perjanjian boleh mengecualikan s. 75 CA tidak timbul.

A **Oleh Hashim Yusoff HMP (bertentangan):**

(1) Kesimpulan daripada kes-kes yang dirujuk oleh Mahkamah Persekutuan dalam kes *Selva Kumar* ialah s. 75 CA mesti diberikan pentafsiran yang ketat. Plaintif yang menuntut ganti
B rugi untuk kemungkiran kontrak masih mesti buktikan ganti rugi sebenar atau pampasan munasabah mengikut prinsip-prinsip yang ditetapkan dalam kes *Hadley v Baxendale.*

(2) Klausa 8.2 SPA dengan jelasnya memperuntukkan bahawa semua ansuran yang dibayar responden mesti ditebus kecuali
C di mana penamatan SPA berlaku dalam masa empat bulan dari tarikh SPA. Responden merupakan pihak yang ingkar dan dengan itu perayu berhak menebus wang tersebut.

(3) Ianya adalah undang-undang terpakai bahawa plaintif mesti
D membuktikan kerugian. Responden ialah plaintif di Mahkamah Tinggi yang menuntut kembali wang tersebut selepas perayu menamatkan SPA. Dengan itu beban atas responden untuk membuktikan kerugian dan bukan perayu yang merupakan pihak yang tidak bersalah. Jikapun salah dapatan siapa plaintif
E sebenarnya, kes *Selva Kumar* memutuskan bahawa di mana mahkamah mendapati susah untuk menilaikan jumlah ganti rugi, mahkamah sepatutnya mengawardkan ganti rugi yang agak banyak bertentangan dengan ganti rugi nominal yang munasabah dan adil mengikut kewarasan baik dan keadilan.

F

(4) Perayu boleh menyimpan pembayaran pertama atau 12% harga pembelian mengikut kl. 8.2(b) SPA. Pembayaran ansuran kemudiannya sehingga masa keingkaran patut juga diberikan kepada perayu sebagai jumlah munasabah memandangkan sifat
G projek berkenaan dan penghentiannya oleh responden tiga tahun selepas SPA ditandatangani. Dapatan juga berdasarkan illustrasi (f) kepada s. 75 CA.

(5) Pihak-pihak khususnya berjanji di bawah kl. 8.2(b) SPA
H bahawa jika terdapat kemungkiran SPA semua wang yang dibayarkan di bawahnya akan ditebuskan. Sejumlah wang ditentukan dengan jelasnya sebagai amaun untuk dibayar jika berlaku kemungkiran SPA. Perayu berhak menerima daripada responden yang memungkiri kontrak pampasan munasabah
I yang tidak melebihi amaun yang ditentukan, sama ada ganti rugi sebenar atau kerugian yang dibuktikan. Di bawah kl. 16.2 SPA pihak-pihak berjanji bahawa jumlah yang ditentukan untuk

dibayar oleh pihak yang ingkar merupakan pampasan munasabah kepada pihak yang tidak ingkar. Mana-mana bantahan kemudiannya ditepikan. Syarat itu tidak bertentangan dengan s. 75 CA.

Case(s) referred to:
Bhai Panna Singh v. Bhai Arjun Sing AIR [1929] PC 179 ***(refd)***
Fateh Chand v. Balkishan Das [1964] 1 SCR 515 ***(refd)***
Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2005] 2 CLJ 914 CA ***(refd)***
Linggi Plantations Ltd v. Jagathesan [1972] 1 MLJ 89 ***(refd)***
Maniam v. The State of Perak [1957] MLJ 75 ***(refd)***
Maula Bux v. Union of India AIR [1970] 1 SCR 928 ***(refd)***
Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd [2003] LR 1 348 ***(refd)***
Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd AIR [2003] SC 2629 ***(refd)***
Ooi Boon Leong v. Citibank [1984] 2 MLJ 222 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 75, 86

Contract Act 1872 [Ind], s. 74

For the applicant - Leong Wai Hong (Claudia Cheah & Wang Shue Wen with him); M/s Skrine
For the respondent - RR Sethu (Basil D Anthony & Denise SF Leong with him); M/s How Zul & Low

[Appeal from Court of Appeal, Civil Appeal No: J-02-742-2001]

Reported by Usha Thiagarajah

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

[1] The appellant in this case appealed against the decision of the Court of Appeal in allowing part of the appeal. It was held by the Court of Appeal that the appellant was entitled to forfeit 12% of the purchase price as a "true deposit" paid under the agreements. However the balance of the monies must be refunded to the respondent as the appellant had failed to strictly prove damage under s. 75 of the Contracts Act 1950 ("the Act").

[2] The appellant was granted leave to appeal on 9 January 2009 on the following two questions of law:

(a) Whether that part of the decision in *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 which obliges a party having the benefit of a liquidated damages clause to prove its losses, notwithstanding the words in s. 75 of the Contracts Act 1950 'whether or not actual damage or loss is proved to have been caused thereby', is correct; and

(b) Whether or not parties entering into a contract are entitled to contract out of the provisions of s. 75 of the Contracts Act 1950.

Background Facts

[3] The appellant and the respondent entered into two sale and purchase agreements ("the agreements") both dated 13 March 1997 containing identical provisions, whereby the respondent agreed to purchase Lots 7 and 14 of the Johor Bahru Waterfront City for the price of RM4,590,000 and RM10,830,000 respectively.

[4] The purchase price for the land was to be paid by way of six instalments. The respondent paid the first three instalments totalling RM9,018,400 including the initial payment of 12% amounting to RM1,850,400, but failed to pay the balance price.

[5] The appellant terminated the agreements and sought to forfeit the sums thus paid in accordance with the terms of the agreements.

[6] The respondent's claim at the High Court was for declaratory reliefs that the agreements were unlawfully terminated by the notice dated 19 April 2000, therefore, the appellant is not entitled to forfeit all sums paid as same is a penalty and unenforceable by virtue of s. 75 of the Act.

[7] The issue before the High Court is whether the part payment of RM9,018,400 could be forfeited by the appellant, and in any case, whether the first payment of RM1,850,400 was a deposit and therefore could be forfeited.

[8] Learned counsel for the respondent conceded that the agreements were lawfully terminated but maintains that the respondent is entitled to a full refund of all sums paid by reason of s. 75 of the Act in that it amounts to a penalty.

[9] He further contended that the appellant cannot rely on the forfeiture clauses to forfeit the entire sum of RM9,018,400 paid and by virtue of s. 75 of the Act the court is empowered to adjudicate on the amount forfeited.

[10] The learned Judicial Commissioner ordered the appellant to refund all monies received under the agreements to the respondent. It was held that since the amount forfeited was part payment of the purchase price, it cannot be forfeited unless the Court is satisfied that it is a reasonable sum under s. 75 of the Act. In determining whether or not the amount forfeited is a reasonable sum, the appellant must furnish proof of the actual damage/loss suffered. As the appellant failed to furnish such proof, the court could not determine the reasonable compensation envisaged by s. 75 of the Act.

[11] According to the learned Judicial Commissioner:

(a) Section 75 of the Act confers upon the court the requisite jurisdiction to ensure that any sum stipulated in the contract must be a reasonable sum before it can be forfeited;

(b) The salient points of the relevant clauses in the agreements showed that the initial payment of 12% was never intended nor regarded to be earnest money or deposit. For the payment to be a deposit it must be regarded as the consideration for the agreement to sell and buy, and not consideration for the conveyance. Further, the term 'deposit' needs to be expressly stated in the agreements;

(c) The absence of the word 'deposit' in the agreements, coupled with the repeated usage of the word 'instalments', showed that the initial payment was not a deposit which is forfeitable, but was a payment made in the nature of instalment towards the purchase price. Since it is an instalment payment and a part payment towards the purchase price, it cannot be forfeited and must be refunded to the plaintiff;

(d) By virtue of the Federal Court decision in *Selva Kumar Murugayah v. Thiagarajah Retnasamy, supra* there is now no difference between penalty and liquidated damages, and in every case, if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty. It

A is also clear that, notwithstanding the words "whether or not actual damages or loss is proved to have been caused thereby" in s. 75 of the Act, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damage or the reasonable compensation in B accordance with the principles in *Hadley v. Baxendale*;

(e) Applying the principles aforesaid, cls. 8.2 and 16.2 in the Agreements, which provided for the forfeiture of the part payment, must be regarded as a penalty and therefore C unenforceable and void. Being in the nature of a penalty the defendant must adduce evidence of loss failing which the court cannot ascertain nor award reasonable compensation to the defendant;

D (f) Liquidated damages in the amount as stipulated in cl. 16.2 cannot be forfeited unless this court is satisfied that it is a reasonable sum and for the court to arrive at a reasonable sum there must be adequate material as to the loss suffered; and

E (g) Nowhere has the defendant adduced evidence to show the loss or damage suffered by them. That being so, the court cannot determine the reasonable compensation envisaged by s. 75 of the Act, and consequently, the defendant must effect a full refund of the sum of RM9,018,400 to the plaintiff.

F

The Decision Of The Court of Appeal

[12] The appellant appealed to the Court of Appeal against the decision of the learned Judicial Commissioner.

G **[13]** There were two principal issues before the Court of Appeal:

(a) Whether the 12% paid by the respondent was a true deposit; and

H (b) Whether the appellant could keep for itself the whole of the 50% it was paid without proof of actual damage.

[14] Learned counsel for the appellant argued that the appellant was entitled to retain the whole sum without proof of damage because of cl. 16.2 of the agreements. According to him, the I parties, by virtue of cl. 16.2, had excluded the application of s. 75 of the Act. It was therefore not open to the respondent to demand the return of any part of the monies paid.

[15] The Court of Appeal allowed the appeal in part. It was held that the appellant was entitled to forfeit 12% of the purchase price as a "true deposit" paid under the Agreements. However the balance sum must be refunded to the respondent as the appellant had failed to strictly prove damage under s. 75 of the Act.

[16] Gopal Sri Ram, JCA in his grounds of judgment held that:

(a) The 'first payment' or 12% of the purchase price was nowhere described in the agreements as a forfeitable deposit. According to cl. 8.2(b) the appellant would get to keep the 12% unless the default occurred within four months in which case the appellant would forfeit only 10%. According to cl. 8.2(b), the function of the first payment was to secure the future performance of the contract. This is exactly what a true deposit does. What the parties had described in their agreements as a first payment was therefore, when the agreements were construed as a whole, in reality a true deposit. By virtue of cl. 8.2(b) the appellant was to forfeit it. The 12% was not in law a penalty;

(b) The fact that the deposit was 12% did not make the deposit unusual or extortionate in the circumstances of the case. The peculiar facts of the instant case made the 12% a fair and reasonable deposit which the appellant could forfeit. The Court of Appeal could not therefore agree with the finding of the Judicial Commissioner that the appellant had to disgorge the 12%;

(c) The Court of Appeal agreed with the Judicial Commissioner that the appellant could not keep the whole of the 50% (less the deposit) without proof of loss. Section 75 of the Act does not apply to a true deposit. This may be forfeited in the event of a default as it represents a genuine pre-estimate of the damage suffered by a vendor. However, any further sum paid towards the balance of the purchase price can only be forfeited upon proof of actual damage. In the present case, the appellant was only entitled to forfeit the balance of the sums paid if it proved damage. There was no such proof. As such it was obliged to return those monies to the respondent;

(d) When the agreements were read as a whole, what cl. 16.2 meant was that the 10% or 12% which was to be forfeited by the appellant was not to be challenged by the respondent as not being fair and reasonable compensation. Both parties knew that this was not a straightforward sale and purchase of land. There were other considerations in the instant case. The appellant as vendor of the land obviously did not want to face a challenge that it ought not to keep any of the sums it had received from the respondent on the grounds that this was not an outright sale and purchase. That was why cl. 16.2 was crafted the way it was; and

(e) Even if there were to be any ambiguity between cls. 8.2 and 16.2, since it was the appellant who relied on cl. 16.2 to justify the forfeiture, that clause should be read *contra proferentum* the appellant and the resulting ambiguity between cl. 16.2 and cl. 8.2 had to be resolved in the respondent's favour. What that meant was that it was not open for the appellant to keep all the monies.

The Contentions Before This Court

[17] Before this court, the appellant submitted that:

(a) The decision in *Selva Kumar* as identified in the first issue is incorrect on the grounds that:

(i) the Federal Court in *Selva Kumar* decided not to construe the words in s. 75 literally but to adopt a more limited construction;

(ii) the Federal Court in its judgment had relied on two old Indian cases. The Indian Supreme Court has in a recent case, *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* AIR [2003] SC 2629 departed from these earlier cases; and

(iii) *Selva Kumar*'s decision insists that damage must be strictly proved in every case despite the presence of a mutually agreed liquidated damages clause, parties are forced to always litigate as the defaulting party would argue that there is no proof of actual damage.

(b) The parties in the instant case have by cl. 16.2 of the agreements contracted out of s. 75 of the Act. In the agreements, by cl. 16.2, the parties "unconditionally and

irrevocably" agreed that the sums stipulated in the agreements to be payable by the defaulting party would constitute reasonable compensation and each party expressly "waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation". Clearly the parties intended to and have by cl. 16.2, contracted out of s. 75 of the Act.

[18] Learned counsel for the respondent on the other hand submitted that:

(a) On the first question, the interpretation of s. 75 has been settled by *Selva Kumar*, in what is a very comprehensive judgment that at most the vendor can be allowed to retain 10% of the purchase price under each agreement and refund the excess. The law is that no vendor can recover or retain without proof by evidence of the extent of loss or damage all sums paid under a contract of sale of property and at the same time retain the property. The vendor could sell the property on the same price (or possibly a higher price). It is not the function of the Federal Court to un-settle the settled principles or drive a horse and coach through the legislation under the guise of interpretation;

(b) The second question was not raised before the High Court at all. The Court of Appeal ruled that the issue does not arise in this case and the Court of Appeal did not decide it at all.

(c) The appellant apparently is relying on certain *dicta* of Lord Wilkinson in *Ooi Boon Leong v. Citibank* [1984] 2 MLJ 222 (PC) which dealt with s. 86 of the Act. The preamble relied on by Lord Wilkinson had changed from the original version of the Contracts Legislation. The current preamble to the Act is an "Act relating to Contracts" but the earlier preamble in the 1899 Enactment was "An Enactment to define and amend certain parts of the Law relating to Contracts". The 1899 Enactment was an exact reproduction of the Indian Act and the sections in 1899 Enactment were similarly numbered as in the Indian 1872 Act. Therefore the 1974 Revised Act preamble "Act relating to Contracts" had subsumed what the 1899 Enactment intended to do "to define and amend the law relating to Contracts". Lord Wilkinson's statement that the

1950 Act "clearly intended to codify the law of contract as regards those aspects of contract law which are grouped under the Act's nine definitive headings" ought to be re-examined. What he said cannot apply to s. 75 of the Act (as was the Indian Act 1872) a departure from common law;

(d) It is the respondent's case that s. 75 of the Act spells out different legal consequences and the Indian and local authorities that deal with general principles do not appear to have been drawn to the attention of the Privy Council in *Ooi Boon Leong*; and

(e) The appellant's sole basis calling for a reconsideration of the entire line of cases on s. 75 is a recent two bench decision of the Supreme Court of India in *Oil & Natural Gas Corp Ltd v Saw Pipes Ltd* [2003] LR 1 348. It deals with compensation for a long term supply contract, not sale of property for a fixed sum. Oil & Natural Gas seems to fall in the line of cases where the loss suffered is incapable of assessment and thus the amount stipulated is a recoverable genuine pre-estimate of damages. The decisions in *Panna Singh, Fateh Chand* and *Maula Bux* are not inconsistent with this. In fact Selva Kumar gives express recognition to the recovery of the stipulated sum where the loss is incapable of assessment. Nowhere does *Oil & Natural Gas* suggests that the provisions of the Contracts Act can be contracted out where the provision was a deliberate departure from the common law.

My Findings

[19] The two issues canvassed before the Court of Appeal may be stated as follows:

(a) Whether the 12% paid by the respondent which were described as the 1st "installment was a true deposit"; and

(b) Whether the appellant could keep for itself the whole sum already paid without having to prove actual damage.

[20] For the reasons given by the Court of Appeal which is clearly set out in its judgment, the court held that the 12%, by whatever label it was called, was in the circumstances of this case an earnest deposit and by virtue of cl. 8.2. the respondent has the

right to forfeit the same. It was not in law a penalty. (See *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2005] 2 CLJ 914).

[21] There was no cross appeal by the respondent, therefore, we do not propose to go into the issue.

[22] The main grievance by the appellant before us is in regard to the balance sum (50% less 12%) which was ordered by the Court of Appeal to be refunded to the respondent. The answer to this question, in my view, turns on the construction to be given to cls. 8.2 and 16.2. of the agreements. For ease of reference I set out below cls. 8.2 and 16.2:

> **8.2 Consequences of termination of Agreement**
>
> Upon the termination of this Agreement under Section 8(1)(B) hereof and without prejudice to any other remedies which the Vendor in entitled under this Agreement:
>
> (a) ...
>
> (b) All instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the Vendor absolutely, except where the termination occurs within four (4) months from the date of this Agreement, in which event an amount equal to ten per centum (10%) of the Purchase Price shall be forfeited to the Vendor absolutely, and all instalments previously paid by the Purchaser to the vendor including the First Payment after deducting the amount forfeited shall be returned to the Purchaser, without interest;
>
> **16.2. Reasonable Compensation**
>
> Both parties hereby unconditionally and irrevocably acknowledge that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

[23] The learned counsel for the appellant in the main contended that reading these clauses together one would be driven to the one and only conclusion that parties had unequivocally agreed that the appellant is entitled to forfeit the whole of the purchase price that were paid at the time the agreements were terminated.

The High Court ruled that notwithstanding cl. 16.2, by reason of s. 75 of the Act, the appellant is required to prove loss before it can forfeit the said sum. This the appellant failed to do. I shall now consider s. 75 of the Act, which reads:

> **75. Compensation for breach of contract where penalty stipulated for**
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[24] This section was taken from s. 74 of the Indian Act 1872 and first introduced as Contract Enactment 1889 later Cap. 52 (Revised FMS Enactments). In *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 the Federal Court had comprehensively considered both the local and Indian authorities on s. 75 of the Act and s. 74 of the Indian Act. For completeness, I should set out the facts in *Selva Kumar* as found in the head note of the report, which are as follows:

> Both the appellant and respondent in this case are medical practitioners. The appellant entered into an agreement in writing ("the agreement") with the respondent whereby the respondent sold his clinic to the appellant for a total purchase price of RM120,000. Pursuant to the agreement, the appellant paid to the respondent RM12,000 on signing the agreement, and thereafter paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly instalments of RM4,000 each. However, at the stage when the appellant had paid up to a total sum of RM96,000 towards the total purchase price, he refused to go on paying the remaining six monthly instalments. The respondent sought to forfeit the RM96,000 by relying on a clause in the agreement which in effect, provided that if the appellant defaulted, all moneys paid to date of such breach would be forfeited absolutely to the respondent as agreed liquidated damages, and the agreement would be terminated. The respondent successfully obtained a declaration from the High Court that the clause was valid and enforceable. The appellant appealed.

[25] In that case, it was held, *inter alia*, that: A

(1) In Malaysia, there is no distinction between liquidated damages and penalties as understood under English law, in view of s. 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby' ("the words in question"). B

(2) However, the words in question must be given a restricted construction. Hence, despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1854] 9 Exch 341; [1843-60] All ER Rep. 461. Any failure to prove such damages will result in the refusal of the court to award such damages. C D

(3) However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play. In any event, the damages awarded must not exceed the sum so named in the contractual provision. E F

[26] It should be noted that the facts in *Selva Kumar* is no different from the present case even though it involved the sale of a clinic. In *Selva Kumar*, the Federal Court examined the following Indian cases dealing with s. 74 of the Indian Act, which is in *pari materia* with our s. 75, namely: G

(a) *Bhai Panna Singh v. Bhai Arjun Sing* AIR [1929] PC 179;

(b) *Fateh Chand v. Balkishan Das* [1964] 1 SCR 515; and H

(c) *Maula Bux v. Union of India* AIR [1970] 1 SCR 928.

[27] It is pertinent to refer to the observations made in some of these cases. In *Bhai Panna Singh*, Lord Atkin who delivered the judgments of the PC stated: I

> The effect of s. 74 Contracts Act of 1892 is to entitle the plaintiffs to recover the sum of Rs10,000 whether penalty or liquidated damages, the plaintiffs must prove the damages they have suffered. The only evidence of loss on resale is that of the loss of Rs1000 … The vendors remained in possession of the rents and profits of the property until re-sale. On the other hand, they have received earnest money Rs500 so that their actual damage is Rs500.

[28] In *Fateh Chand*, Shah J at p. 1411 said that:

> The Indian Legislature has sought to cut across the of rules and presumptions under the English Common Law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.
>
> … the court jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified on the contract as liable to forfeiture.

[29] At p. 1412, he held that:

> There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted.

[30] In *Maula Bux*, the Supreme Court found that the government could have proved the loss by leading evidence of the rates but failed to do so and hence went on to disallow the forfeiture.

[31] In the local case of *Maniam v. The State of Perak* [1957] MLJ 75, Thomson J following Bhai Panna held that:

> In brief, in our law in every case if a sum is named in a contracts as the amount to be paid in case of breach, it is to be treated as a penalty.

(See also *Linggi Plantations Ltd v. Jagathesan* [1972] 1 MLJ 89, which expressed the same view).

[32] Reverting to the first question posed to us, based on the authorities considered above, it is my view that the legal position may be summarised as follows:

The appellant/vendor cannot recover or retain without proof by evidence of the loss or damage suffered as a result of the breach of the agreements. This is because s. 75 of the Act provides that in every case, the court must determine what is reasonable compensation, "whether or not actual damage or loss is proved to have been caused thereby." A B

[33] And as was held in *Selva Kumar* actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v. Baxendale* [1854] 9 Exch. 341; [1843-1860] 9 Exch. 341. C

[34] The appellant urged this court to depart from *Selva Kumar* and the long series of decisions on s. 75 relying on a recent two bench decision of the Supreme Court of India in *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* [2003] LR 1 348. D

[35] Upon close examination, I find that *Oil & Natural Gas* falls in the category of cases where the loss suffered is incapable of assessment. Hence, the amount stipulated may be regarded as a genuine pre-estimate of damages and therefore it is recoverable. Further in *Selva Kumar* itself the court recognized that where the court finds it difficult to assess damages as there is no known measure of damages employable, the stipulated sum may be recoverable. It should also be noted that nowhere in *Oil & Natural Gas,* the Indian Supreme Court stated that the provisions of the Indian Contracts Act can be contracted out. E F

[36] In view of the above, I am of the view that *Selva Kumar* is still good law.

[37] For the above reasons, I would therefore answer the first question in the affirmative. G

[38] Moving on to the second question, I must say that whether or not this court should answer this question would depend firstly on whether, on the proper construction of the agreements, the parties had in effect excluded the application of s. 75 of the Act. This issue was raised for the first time in the Court of Appeal. This, in my view, is nothing more than an attempt to salvage what is otherwise a weak case. In this regard, I am in agreement with the view expressed by the Court of Appeal, which is found at p. 925 of the judgment of Gopal Sri Ram, JCA which reads: H I

> In our judgment, when these agreements are read as a whole, what cl. 16.2 means is that the 10% or 12% which is to be forfeited by the appellant is not to be challenged by the respondent as not being fair and reasonable compensation. If you look at the objective aim of the transaction you will see why cl. 16.2 was put in. Mark you, both parties knew that this was not a straightforward sale and purchase of land. As earlier rehearsed, there was other consideration here. The appellant as vendor of the land obviously did not want to face a challenge that it ought not to keep any of the sums it had received from the respondent on the ground that this was not an outright sale and purchase. That is why cl. 16.2 is crafted in the way we find it. Hence, cl. 16.2 does not produce the effect that Mr. Pradhan's ingenious argument says it does.
>
> Alternatively; and this is the second obstacle; if there is any conflict or contradiction between cl. 8.2 and 16.2, then there arises an ambiguity as to what the joint effect of these two clauses is. Since it is the appellant who relies on cl. 16.2 to justify the forfeiture, that clause should be read *contra proferentum* the appellant and the resulting ambiguity between it and cl. 8.2 must be resolved in the respondent's favour. What that means is that it is not open for the appellant to keep all the monies.

[39] In short there is no clear provision in the agreements which excludes the application of s. 75 of the Act.

[40] For the above reasons, I agree with the Court of Appeal that, in the circumstances of this case, the second question does not therefore arise.

Conclusion

[41] In the upshot, the appeal is dismissed with costs. Deposit to respondent to account of taxed costs.

[42] My learned brother Alauddin Mohd. Sheriff, PCA has seen this judgment in draft and expressed his agreement with it.

Hashim Yusoff FCJ:

Factual Background

[43] The appellant (defendant in the High Court) entered into two sale and purchase agreements both dated 13 March 1997 ("the SPA") containing identical provisions, with the respondent

(plaintiff in the High Court) who agreed to purchase lots 7 and 14 of the Johor Bahru Waterfront City, from the appellant and undertook further obligation to construct buildings on them in accordance with the plans prepared and provided by the appellant. The purchase price for the land was to be paid by instalments. The appellant was developing a mixed development project in Johor Bahru called the JB Waterfront City. The respondent was to commence construction of the units for sale to end-purchasers within three months according to the plans set out in the agreements. The respondent agreed to complete the units within three years from the date of issuance of the document of title.

[44] The purchase price for the land was to be paid in instalments in the manner as set out in the Second Schedule to the said SPA. The respondent made the initial payment of 12% and then made subsequent payments amounting to about 50% of the purchase price under both agreements. After that the respondent defaulted in making payments. The appellant held the respondent responsible for breach of the agreements and forfeited all the monies paid to them. The respondent then commenced proceedings by originating summons and sought to recover all the money it had paid to the appellant.

Findings Of The High Court And The Court of Appeal

[45] At the High Court the learned Judicial Commissioner ordered the appellant to refund all the monies received under the SPA to the respondent as the appellant failed to furnish proof of actual damage suffered. On appeal however the Court of Appeal allowed the appeal in part by holding that the appellant was entitled to forfeit 12% of the purchase price as a "true deposit" paid under the SPA but must refund the balance of monies received exceeding the 12% as the appellant had failed to strictly prove damage under s. 75 of the Contracts Act 1950 ("the Act").

Questions Of Law

[46] On 9 January 2007, the appellant obtained leave from this Court to appeal against the decision of the Court of Appeal on the following questions:

(i) Whether that part of the decision in *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 which obliges a party having the benefit of a liquidated damages clause to

A prove its losses, notwithstanding the words in s. 75 of the Contracts Act 1950 "whether or not actual damages or loss is proved to have been caused thereby", is correct?

(ii) Whether or not parties entering into a contract are entitled to
B contract out of the provisions of s. 75 of the Contracts Act 1950?

The Appeal

[47] Learned counsel for the appellant, in his submission referred
C to cls. 8.1 and 8.2 of the SPA which read as follows:

Section 8.1 Default of the Purchaser

If the Purchaser:

D (a) fails for any reason to pay any instalment payable (other than the First Payment) in accordance with the Second Schedule of this Agreement and/or any interest payable thereon; and/or

(b) ...

E

(c) ...

(d) ...

(e) ...

F

(f) ...

then the Vendor may give notice in writing to the Purchaser specifying the relevant default and requiring the Purchaser to remedy the default within fourteen (14) days from the date of the
G notice. If the Purchaser fails to remedy the relevant default within the period specified in the said notice, then without prejudice to any other rights or remedies available to the Vendor under this Agreement the Vendor shall be entitled at the cost and expense of the Purchaser and at the Vendor's sole discretion to the following remedies:

H

(A) ...

(B) to terminate this Agreement in which case Section 8.2 hereof shall apply.

I

Section 8.2 Consequences of termination of Agreement

Upon the termination of this Agreement under Section 8.1(B) 6 hereof, and without prejudice to any other remedies which the Vendor is entitled under this Agreement:

(a) ...

(b) all instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the Vendor absolutely, except where the termination occurs within four (4) months from the date of this Agreement, in which event an amount equal to ten per centum (10%) of the Purchase Price shall be forfeited to the Vendor absolutely, and all instalments previously paid by the Purchaser to the Vendor including the First Payment after deducting the amount forfeited shall be returned to the Purchaser, without interest.

[48] It was therefore submitted that the burden was on the innocent party to prove the loss. In the instant appeal it was argued that no evidence was led by the respondent (plaintiff) to show that it had actually suffered any loss. The appellant's solicitor's letter dated 19 April 2000 (at p. 289 of the appeal record) addressed to the respondent, merely stated the termination of the SPA and *inter alia*, the forfeiture of all instalments previously paid by the respondent (plaintiff) totalling RM2,970,745.65.

[49] Reference was made to the case of *Linggi Plantations Ltd. v Jagatheesan* [1972] 1 MLJ 78, where the questions for determination in the proceedings was whether a vendor was entitled to forfeit a deposit paid on a contract for the sale of real property following its non-completion by the purchaser, though the vendor was not in a position to prove actual damage flowing from the purchaser's breach of contract. On appeal to the Privy Council, it was held:

(1) the contract meant, unambiguously, that in the event of a failure by the purchaser to complete and notice to terminate being given, the vendor was at liberty to forfeit the deposit and to claim for any damage which he had suffered over and above the amount of the deposit, after giving credit for the amount of the deposit;

(2) section 65 of the Ordinance was not applicable to the circumstances of the existing case. The point raised was not one which could be sustained in the light of the authorities and the language of the section;

(3) once it was decided that the construction of the contract was such that the sum of $377,500 was paid as a true deposit and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, section 75 of the Ordinance could have no application when the contract was properly terminated, and the deposit was forfeited whether or not damage was proved. There was no difference in this context between the expression "deposit" and the expression "earnest money". A reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

[50] It was further submitted that according to the schedule of payment (the Second Schedule of the SPA) the first payment, in point of time, ie, immediately upon the signing of the SPA on 13 March 1997, refers to the 12%. The respondent also had paid the second progress payment and the third progress payment of 20% each to the appellant. However the respondent only made part payment of the fourth progress payment to the appellant in the sum of RM1,000,000 despite numerous demand letters from the appellant to the respondent. In total, the respondent paid RM2,866,800 for the first agreement and RM6,131,600 for the second agreement, making a total of RM8,998,400 and not RM9,018,400 as stated in the High Court grounds of judgment at appeal record two p. 33.

[51] Learned counsel for the Respondent however submitted that under s. 75 of the Contracts Act, the payments made is deemed a penalty and therefore the innocent party must justify by proving its loss. Moreover in the instant appeal, the appellant had forfeited all the payments made by the respondent and at the same time retained the property as well. He submitted that such a situation would amount to unjust enrichment because the object of damages is merely compensation and not punishment.

Findings

[52] Section 75 of the Contracts Act 1950 provides:

Compensation for breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the

party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[53] Several illustrations to s. 75 are given but I feel that illustration (f) is relevant for the purpose of the present appeal ie:

(f) A undertakes to repay B a loan of $1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

[54] In the case of *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, "both the appellant and respondent in the case were medical practitioners. The appellant entered into an agreement in writing ('the agreement') with the respondent whereby the respondent sold his clinic to the appellant for a total purchase price of RM120,000. Pursuant to the agreement, the appellant paid to the respondent RM12,000 on signing the agreement, and thereafter paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly instalments of RM4,000 each. However, at the stage when the appellant had paid up to a total sum of RM96,000 towards the total purchase price, he refused to go on paying the remaining six monthly instalments. The respondent sought to forfeit the RM96,000 by relying on a clause in the agreement which in effect, provided that if the appellant defaulted, all moneys paid to date of such breach would be forfeited absolutely to the respondent as agreed liquidated damages, and the agreement would be terminated. The respondent successfully obtained a declaration from the High Court that the clause was valid and enforceable. The appellant appealed."

[55] The Federal Court in that case held:

(1) In Malaysia, there is no distinction between liquidated damages and penalties as understood under English law, in view of s. 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby' ('the words in question').

(2) However, the words in question must be given a restricted construction. Hence, despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1854] 8 Exch 341; [1843-60] All ER Rep 461. Any failure to prove such damages will result in the refusal of the court to award such damages.

(3) However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play. In any event, the damages awarded must not exceed the sum so named in the contractual provision.

(4) The instant case falls into the category of cases where damages could be proved by settled rules. The respondent could have proved the actual loss of, for example, use of the medical equipment in the clinic, but failed to do so. Therefore, the court could not quantify any award of damages to him.

(5) In any event, apart from the real loss that had not been proved, the respondent was entitled to forfeit a reasonable amount of deposit. The sum of RM12,000 was not too large to prevent it from being fully forfeitable. Accordingly, the respondent had to refund the sum of RM96,000 less the deposit to the appellant.

[56] In delivering the judgment of the court in that case, Peh Swee Chin FCJ referred to the agreement whereby the vendor had agreed to sell to the purchaser the said premises free of all encumbrances for a total sum of RM120,000. His Lordship then referred to the relevant cl. 15(b) in the said agreement which reads:

> In the event the purchaser shall default in his obligations herein all moneys paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and therefore this agreement shall be declared null and void. ...

[57] Later at p. 823, his Lordship opined on s. 75 of the Contract Ordinance (which is now the Contracts Act 1950) as follows:

We have long known the object for which the section in question was enacted first in India and later here in our country. Thomson J (as he then was) in *Maniam v. The State of Perak* [1957] MLJ 75, commenting on arguments advanced before him as to whether a certain sum was to be regarded either as a penalty or as liquidated damages, said (at p 76):

> In the first place, in this country there is no difference between penalty and liquidated damages. Section 75 of the Contract Ordinance which is the same as s. 74 of the Indian Contract Act reads as follows:
>
> > When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> As is said in *Pollock and Mulla on the Indian Contract Act* (7th edn) at p 410, 'This section boldly cuts the most troublesome knot in the common law doctrine of damages'. In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty. See *Bhai Panna Singh v. Bhai Arjun Singh* AIR [1929] PC 179.
>
> It is obvious that any submission as to whether a certain clause in a contract is a penalty or liquidated damages is an exercise in futility. Clause 15(b) of the agreement before us is therefore unenforceable and is to be regarded as a penalty, void in equity for being unconscionable.

[58] Reference was also made in that case to the Privy Council case of *Bhai Panna Singh v. Bhai Arjun Singh* AIR [1929] PC 179 where Lord Atkin said in connection with s. 74 of the Indian Contract Act 1872 (corresponding to s. 75 of our Act), held:

> The effect of s. 74 of the Contract Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs10,000, whether the penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.

[59] The gist of the cases referred by this court in the *Selva Kumar* case is that s. 75 of the Contracts Act 1950 must be given a restricted construction. In other words, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1854] 8 Exch 341.

[60] Coming back to the present appeal, learned counsel for the appellant submitted that the contractor had abandoned the project three years later. Although proof of loss and damages could be given it would be a very lengthy process. It was to avoid this lengthy process that the parties could agree on a stipulated sum in the event of a breach. It could not be the case that the innocent party would be the one to have to prove the loss.

[61] I am of the view that s. 8.2(b) of the SPA is very clear in stating that "all instalments previously paid by the purchaser to the vendor including the first payment and any interest thereon paid as at the date of termination shall be forfeited to the vendor absolutely, except where the termination occurs within four (4) months from the date of this agreement. ..."

[62] In the instant appeal, it is the respondent which was the defaulting party when it stopped making further payments of instalments in accordance with the schedule of payment in the SPA. As a result, the appellant forfeited all the monies paid to it.

[63] There is also, cl. 16.2 of the SPA which provides:

> **Section 16.2 Reasonable Compensation**
>
> Both parties hereby unconditionally and irrevocably acknowledge that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

[64] The Court of Appeal in its judgment in this case at [2005] 2 CLJ 914 at p. 926 said:

> ... if there is any conflict or contradiction between cl. 8.2 and 16.2, then there arises an ambiguity as to what the joint effect of these two clauses is. Since it is the appellant who relies on cl. 16.2 to justify the forfeiture, that clause should be read *contra proferentum* the appellant and the resulting ambiguity between it

and cl. 8.2 must be resolved in the respondent's favour. What that means is that it is not open for the appellant to keep all the monies.

[65] It is also trite law that it is up to a plaintiff to prove his loss. In the instant appeal it was the respondent which was the plaintiff in the High Court that sought to claim back the moneys which it had paid to the respondent after the latter terminated the SPA. Therefore I am of the view that the burden lies on the plaintiff (respondent) to prove its loss, not on the appellant which is the innocent party.

[66] However even if I am wrong as to who is the actual plaintiff, it was held by this court in *Selva Kumar*'s case *(supra)* that where the court finds it difficult to assess damages for the actual damages as there is no known measure of damages employable, the court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play.

[67] In the instant appeal there was no evidence tendered to show what loss had been suffered. What we have is that the respondent had paid 12% as the initial payment and thereafter subsequent payments amounting to about 50% of the purchase price under both agreements. It must be noted that this was not just a sale and purchase of property simpliciter. As stated earlier, the appellant was developing a mixed development project and the respondent was to do the construction and complete it within three years after the SPA was signed. The appellant still retains the property even after the termination of the SPA due to the respondent's default.

[68] I would therefore agree with the Court of Appeal's reasoning that the appellant could keep the 'first payment' or 12% of the purchase price pursuant to cl. 8.2(b) of the SPA. And I would add that the subsequent payment of instalments up to the time of default would also be awarded to the appellant as being an amount that is reasonable in view of the nature of the project and its abandonment by the respondent three years after the SPA was signed.

[69] My finding is also based on illustration (f) to s. 75 of the Act. However in this case for lot No. 7, the respondent had agreed to purchase the property from the appellant for

RM4,590,000. 12% of the purchase price (RM550,800) was paid immediately upon signing of the SPA. Out of the balance of the purchase price (RM4,039,200) RM918,000 was to be the first payment and the remaining balance to be paid by five instalments as provided in the Second Schedule of the SPA (similar to that of the SPA for lot No. 14).

[70] For lot No. 14, the respondent had agreed to purchase the property from the appellant for RM10,830,000. 12% of the purchase price (RM1,299,600) was paid immediately upon signing the SPA. Out of the balance of the purchase price (RM9,530,400) the same manner of payment was adopted ie, by five instalments as provided in the Second Schedule of the SPA as follows:

Second Schedule

(which is to be taken read and construed as an integral part of this Agreement)

Schedule Of Payment

No.	Time For Payment	Percentage
1.	Immediately upon the signing of this Agreement	12%
2.	Within three (3) months from the date of this Agreement	20% (First Payment)
3.	Within six (6) months from the date of this Agreement.	20%
4.	Within nine (9) months from the date of this Agreement	20%
5.	Upon issuance of document of title	20%
6.	Upon completion of Infrastructure Works	8%

* Items 5 and 6 need not be in the above order.

[71] While illustration (f) to s. 75 of the Act states:

> ... in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

[72] Section 8.2(b) of the SPA provides that "all instalments previously paid by the purchaser to the vendor including the first payment and any interest therein paid as at the date of termination shall be forfeited to the vendor absolutely ..." A

[73] It is also trite law that the courts have to give effect to the provision of the Statute. In the instant appeal the parties had agreed to a stipulated sum and the manner of payment at fixed instalments. All these payments could be easily calculated. And the parties have specifically agreed under s. 8.2(b) of the SPA, that in the event of a breach, all the monies already paid shall be forfeited. So clearly a sum had been named as the amount to be paid in case of such breach and the vendor (the appellant) is therefore entitled to receive from the purchaser (respondent) who has broken the contract reasonable compensation not exceeding the amount so named, whether or not actual damage or loss is proved to have been caused thereby. Under cl. 16.2 of the SPA, the parties had agreed that the sums stipulated in the SPA to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and had also waived any objection thereafter that those sums would be otherwise then fair or reasonable compensation. This stipulation I feel, is not contrary to s. 75 of the Act. B C D E

[74] For the above reasons, I would therefore answer Question (i) in the negative and Question (ii) in the positive. The appeal is therefore allowed with costs. The order of the Court of Appeal is set aside and the deposit is to be returned to the appellant towards account of taxed costs. F

G

H

I